In the High Court of Judicature at Madras

Dated: 19/11/2003

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The Honourable Mr.Justice R.Jayasimha Babu
and
The Honourable Mr.Justice S.K.Krishnan

Writ Appeal No.1347 of 1998 and Writ Appeal No.1348 of 1998

T.Natarajan ..... Appellant

-Vs-

1. Indian Oxygen Limited,
represented by its Plant Manager,
Madras 600 081.

2. Presiding Officer,
Industrial Tribunal,
Madras 600 104. ..... Respondents

Writ Appeals filed against the order of a learned single Judge of this Court in writ petitions No.3847 of 1989 and 3892 of 1994 dated 17 .07.1998.

!For Appellant : Mr.N.G.R. Prasad,
for M/s.Row and Reddy

^For 1st Respondent : Mr.Sanjay Mohan,
Senior Counsel for
M/s. Ramasubramanian Associates

:JUDGMENT

R.Jayasimha Babu, J.

The appellant workman who was employed as a carpenter for about thirty six years with the first respondent, was served with a charge sheet on 17.06.1983 for the misconduct of wilful insuborindation and disobedience to carry out the orders of the superiors and for idling and wasting time during working hours. The appellant's explanation that he was entitled to a helper and the employer's refusal to provide him with one, justified his disobedience to carry out the work assigned to him, was rejected by the enquiry officer, who found that the employee had been doing work without the helper and that the work that had been assigned to him, did not, in fact, require the assistance of a helper.

2. Based on the report of the enquiry officer, who found the

misconduct to be proved, the employer wrote to the appellant on 20.07.198 4 expressing it's intention to dismiss him from service. On the same day a petition was filed by the employer before the Industrial Tribunal under Section 33(3) of the Industrial Disputes Act, 1948, seeking permission to dismiss the appellant as he was at that time an office bearer of the union and thus, a protected workman under Section 33 (3) of the Act. That application had become necessary by reason of the fact that there was an industrial dispute pending between the management and the workman at that time.

3. While that petition was pending, the appellant ceased to be a protected workman on his having ceased to be an office bearer of the union. The respondent, on being informed by the union of that fact, applied to the Tribunal to withdraw the application that it had filed for permission to dismiss, dismissed the workman, and filed an application under Section 33(2)(b) for approval of the dismissal.

4. The workman, some months after the application for permission under Section 33(3) was dismissed as withdrawn, and the application for grant of approval of dismissal filed under Section 33(2)(b) had been pending, filed a complaint under Section 33A of the Act alleging contravention of section 33 by reason of the employer's withdrawal of the petition that had been filed under section 33(3). That application was considered by the Tribunal along with the employer's application filed under Section 33(2)(b). The Tribunal by an order made on 25.10.1988 after holding that the application under Section 33(2) of the Act was maintainable, held that the enquiry that had been held against the workman by the employer prior to his dismissal, was not fair and proper, but that the employer was entitled to adduce evidence before the Tribunal as the employer had sought leave to do so.

5. After considering the evidence so adduced by the employer before it, the Tribunal held that the misconduct was proved and allowed the application under Section 33(2)(b) filed by the employer and dismissed the workman's complaint under Section 33A.

6. Mr. N.G.R. Prasad, learned counsel for the workman submitted that, having regard to the history of section 33 of the Act, the rigour of which was relaxed by the Amending Act 36 of 1956, and the decision of the Supreme Court in the case of Fakirbhai Fulabhai Solanki vs. Presiding Officer, (1986) 3 SCC 131, in which it was held that the failure of the employer to pay subsistence allowance to a protected workman during the six years pendency of the application under Section 33(3), vitiated the permission given the Tribunal ought not to have dismissed the complaint under Section 33A.

7. In the case of Fakirbhai the employer had not withdrawn the petition for permission on the ground that the workman concerned had ceased to be a protected workman and it had not been urged before the Court that the status of the workman had changed during the pendency of the application. The judgment does not indicate that the workman in that case was not a protected workman at the time the permission for dismissal was granted by the labour Court.

8. The object of Sections 33 and 33A, as also the purpose for which section 33(3) was enacted, were considered by a three Judge Bench of the Supreme Court in the case of Air India Corporation vs. V.A. Rebellow, (1972) 1 SCC 814. The Court observed that, broadly speaking, sections 33 and 33A were meant to protect the workmen concerned in an industrial dispute against victimisation by the employer on account of raising or continuing such pending dispute and to ensure that those pending proceedings are brought to expeditious termination in a peaceful atmosphere undisturbed by subsequent cause tending to exacerbate the already strained relationship between the workman and the employer.

9. With regard to Section 33(3), the Court observed that it imposes an unqualified ban on the employer with regard to action by discharging or punishing the workman whether by dismissal or otherwise. The Court observed, "The Legislature in his case appears to be anxious for the interest of healthy growth and development of trade union movement to ensure for him complete protection against every kind of order of discharge or punishment because of his special position as an officer of a registered trade union recognised as such in accordance with the rules made in that behalf."

10. In the case of P.D. Sharma vs. State Bank of India, AIR 1968 SC 985, wherein the question considered by the Supreme Court was as to whether the proceedings initiated under Section 33(3) would survive even after the industrial dispute had been adjudicated upon, the Court, after comparing sections 33(2) and 33(3) of the Act, held, "..." On a comparison of sub-sections (3) & (2) of Section 33 it will be seen that the scope of the two provisions are wholly different. Taking the case of a worker's discharge, or punishment by dismissal, or otherwise, in the former the previous permission of the authority before which the industrial dispute is pending is necessary, but under the latter only a subsequent approval from a competent authority is needed. Though the application under that provision should be made to the authority before which the industrial dispute is pending, the approval to be obtained need not be from that authority. Once approval is given it goes back to the date on which the order in question was made. If the approval asked for is not accorded, then the action taken by the employer becomes ab initio void, and the employee will continue in service and his conditions of service will also continue without any break as if the order in question had not been made at all."
With regard to section 33(3) of the Act the Court held that, as the sole reason for the application, was the pendency of the industrial dispute, and that once that dispute was decided, the ban placed on the common law, statutory or contractual rights of the employer stood removed, and the employee was free to exercise those rights.

11. The Court, therefore held that unlike a proceeding under Section 33(2)(b), which does not come to an end with the award being made in the industrial dispute, as had been held by the Supreme Court in the case of Tata Iron and Steel Co. Ltd. vs. S.N. Modak, AIR 1966 SC 380, proceedings under Section 33(3) of the Act would come to an end with the disposal of the industrial dispute.

12. In Sharma's case, the Court also referred to the history of Section 33 and with regard to the amendment effected by amending Act 36 of 1956, the Court observed that, "the amendment made in 1956 was made possibly with a view to avoid unnecessary interference with the discretionary jurisdiction of the employer in respect of employee's misconduct not connected with the pending industrial dispute."

13. The view expressed by the Bench in the case of Sharma that, if the approval is not granted in an application filed under Section 33 (2)(b), the action taken by the employer would become ab initio void, was affirmed by the recent judgment of the Constitution Bench in the case of Jaipuri Zila Sahakari Bhoomi Vikas Bank Ltd. vs. Ram Gopal Sharma, (2002) 2 SCC 244, wherein it was held that the requirement of the proviso to Section 33(2)(b) is mandatory, and that failure to make an application for approval of the order of discharge or withdrawal of such application after making it, would render the order of dismissal void and inoperative.

14. The status of 'protected workman' is accorded to such of the workmen as are recognised as such by the employer in accordance with S.33(3) of the Act read with the applicable Rules framed by the Central or State under the Industrial Disputes Act. The explanation to Section 33(3) defines "protected workman" as one, "who being a member of the executive or other office-bearer" of a registered trade union connected with the establishment, is recognised as such in accordance with rules made in this behalf.

15. Under Rule 61 of the Industrial Disputes (Central) Rules, 1957 , a member or executive or other office bearer of a trade union is to be recognised as a protected workman for a period of 12 months. In the Rules framed by the State Government being Tamil Nadu Industrial Disputes Rules, 1958, Rule 65(1) provides that the Unions have to submit to the employer, a list of the workmen for whom recognition is sought as protected workmen during the subsequent year.

16. The period for which the status of protected workmen is accorded, is for a period of one year. Unless that status is extended by any further order of recognition of that status, the fact that the workman was recognised as a protected workman in one year does not make him, for the purpose of section 33 a protected workman for all years upto which he remains in service or during the period for which the dispute may pend between him and the employer after he becomes a protected workman.

17. As observed by the Court in the case of Sharma, the object of Section 33(3) is to avoid fresh cause for disharmony between the employer and the workman, and to ensure healthy growth and development of trade unions movement by extending protection to the office bearers of such unions who had been given the status of protected workmen, by preventing the employer from discharging or punishing them because of the workmen's special position as an officer of the union.

18. When an employer seeks to take action against a protected workman for any misconduct committed by such workman, the employer may not proceed to

impose any penalty on such workman in cases where any industrial dispute between the employer and the workman is pending, without first obtaining the permission of the forum before which the dispute is pending.

19. There is, however, no bar on the employer initiating proceedings for misconduct against a protected workman, holding an enquiry, and thereafter, refrain from making any order imposing any penalty during the period of pendency of the dispute, but after the dispute comes to an end, proceed to impose the penalty for the proved misconduct. What is interdicted is only action during the pendency of the dispute, and that is the reason why the Supreme Court in the case of Sharma held that an application for permission will come to an end when the dispute itself will come to an end.

20. If it is open to the employer to penalise a protected workman without the permission of the Tribunal after the industrial dispute has come to an end, even when an application under Section 33(3) for permission to impose punishment had been filed and had not been disposed off during the pendency of the industrial dispute, it is difficult to see how the withdrawal of the application after the workman had ceased to be protected workman, is in any way violative of S.33 of the Act.

21. In principle, therefore, there can be no objection to the employer imposing penalty on a workman who was a protected workman, but who had ceased to be the workman at the time the penalty is imposed and thereafter seeking approval of the forum before which the industrial dispute is pending, by making an application under Section 33(2)(b) of the Act.

22. The protection extended to a protected workman does not stand indefinitely extended merely by reason of the fact that the employer has filed an application seeking permission of the concerned forum to impose penalty on the protected workman. The status of a protected workman is limited to the period specified in the Rules and does not extend beyond.

23. The withdrawal of the petition that had been filed by the employer in this case for permission to dismiss a protected workman, after he had ceased to be the protected workman, did not amount to contravention of S.33 of the Act. By reason of the employer proceeding to dismiss the employee after he ceased to be a protected workman and simultaneously filing an application under Section 33(2)(b) also, no contravention of S.33 can be said to have been committed by the employer. The application filed under Section 33(2)(b) would have continued to require consideration by the Tribunal even after the industrial dispute had come to an end.

24. In this case, the application was considered before the industrial dispute came to an end. The Tribunal itself recorded evidence in relation to misconduct that had been alleged and for committing which the penalty had been imposed. The Tribunal held that the misconduct alleged had been proved, and granted the approval that was sought. There is no infirmity in the order so made by the Tribunal. The further order made by the Tribunal dismissing the application filed under Section 33A was, having regard to the fact that the withdrawal of the application under Section 33(3) after the

workman had ceased to be a protected workman, did not amount to any contravention of Section 33, also is in accordance with law and has rightly not been interfered with by the learned single Judge.

25. Though it was open to the workman to raise an industrial dispute with regard to the dismissal notwithstanding the approval granted he has not done so. The dismissal was effected in 1985.

26. We do not see any tenable ground for interference with the order under appeal. The appeal is dismissed.

Index : Yes
Web : Yes

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Presiding Officer,
Industrial Tribunal,
Madras 600 104.